

# **The cost of the non-Constitution**

## **Commission staff Working paper**

### **Introduction**

The original intention was that, provided that all the instruments of ratification had been deposited, the Constitution would enter into force on 1 November 2006. Even though fifteen Member States have approved the Treaty, the results of the referendums in France and the Netherlands in the Spring of 2005 threw this timetable off course.

The problems encountered during the ratification process led the European Council to call for a period of reflection in which the people of Europe, the social partners, political parties, elected representatives and European Institutions were encouraged to debate the future of Europe. With "Plan D", the Commission gave an impetus to these debates by setting out new ways to get Europeans involved.<sup>1</sup> In Spring 2006, the Commission drew conclusions from this process<sup>2</sup> and launched a programme of action designed to meet the concerns of the public and to seek to create the conditions needed for an institutional settlement<sup>3</sup>.

The last two years have shown that it is still possible to take major strides forward under the existing treaties. However, there are limits to what the enlarged Union is able to achieve with no change to the existing treaties.

President Barroso summarised the consequences of no Constitution before the European Parliament<sup>4</sup>:

“What is it that we will be giving up if we don’t have a Constitutional Treaty? We will be giving up a clear definition of the distribution of powers at the various levels, we will be giving up increased use of co-decision and qualified majority voting, we will be giving up a legally binding Charter of Fundamental Rights, we will be giving up an EU Minister for Foreign Affairs, who would also be Vice-President of the Commission, we will be giving up more effective action in areas such as public health, food safety, and safe and secure energy because the Constitution increased powers in these fields. We will also be turning our backs on greater coherence towards the outside world.

On this point I must tell you – and my experience of eighteen months as President confirms this – Europe truly needs what the Constitutional Treaty offered in terms of its relations with the rest of the world: more effectiveness, more democracy and more coherence.

The existing Treaties will not allow us to achieve all these objectives in full. Let us be clear about this, Nice is not enough.”

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<sup>1</sup> "Plan D for democracy, dialogue and debate" (COM(2005) 494 final, 13 October 2005)

<sup>2</sup> 'The Period of reflection and Plan D', COM(2006)212 final of 10 May 2006.

<sup>3</sup> 'A Citizens' Agenda - Delivering results for Europe', COM(2006)211 final of 10 May 2006.

<sup>4</sup> Strasbourg, 14 June 2006

This document takes these remarks as a starting point and – without seeking to be exhaustive – highlights the areas in which, without the Constitution, the Union will be held back in its determination to act in a simple, democratic and effective manner.

But before we move on to these areas we need to stress the symbolic significance of the Constitution. Both its novel method of drafting when compared to previous Treaty revisions, and its intended role as a replacement for all the existing Treaties, make this a “reforming” text, designed to rally all the Member States around common values and ambitions. Signed by twenty-five Member States and enjoying the support of the three observer states in both the Convention and the inter-governmental conference (Bulgaria, Romania and Turkey), the Constitution embodies the common desire to work together on a project for integration.<sup>5</sup>

## **1. Strengthening Union policies**

- Fundamental rights

The European Union’s commitment to human rights is not a recent phenomenon. The obligation to respect the fundamental rights laid down in the European Convention on Human Rights (ECHR) has been incorporated in the Treaties step by step.

Fifty years after the adoption of the ECHR, the Charter of Fundamental Rights of the European Union was agreed. This document reflects a synthesis of the common values of the Member States. For the first time, a single constitutional text covers not only traditional civil and political rights but also economic and social rights spread over national law and international agreements which are difficult to enforce in court, as well as a ‘new generation’ of rights, such as bioethical principles. Yet despite its undeniable political importance the Charter today continues to lack binding legal force.

The intention in incorporating the Charter of Fundamental Rights into the text of the Constitution was to provide the European Union with a set of fundamental rights which would be legally binding on the Union, its institutions, agencies and bodies, but also on the Member States whenever they were implementing Union law. In this way, individuals whose liberties were under attack would be able to defend their rights in an effective and meaningful way. If the Constitution does not enter into force, citizens will have no such guarantee.

A second breakthrough in the Constitution is the authorisation, indeed the obligation, for the Union to accede to the ECHR. As well as its political importance, this would close a gap in protection, since against all logic the Union’s institutions are the only public authority in Europe which is not yet subject to scrutiny by the European Court of Human Rights. Without the Constitution and with no legal basis in the present treaties, accession to the ECHR is not possible. The gap in protection for citizens will continue.

Finally, a number of horizontal provisions could, without the Constitution, remain no more than good intentions, with no guarantee that they will be taken into account in the drafting and implementation of policy. An example is the horizontal clause requiring the Union, when drawing up and implementing policies, to combat all forms of

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<sup>5</sup> It is worth noting that the idea of a Constitution still enjoys widespread support, even if this varies from one country to another (Standard Eurobarometer 65 – July 2006)

discrimination, whether based on sex, race, religion or sexual orientation. The same applies to the promotion of the Union's values and rights, which a country must respect before it can accede to the Union.

- The area of freedom, security and justice

From the Single Act to the Treaty of Nice, the framework of cooperation between Member States in the field of justice and home affairs has developed into a much more ambitious area of freedom, security and justice.

However, the attacks in London and Madrid, to give just two examples, have clearly demonstrated that the danger from international terrorism in Europe is greater than ever. At the same time, organised crime is always looking to take advantage of the absence of internal frontiers, and powerful migratory pressures in areas like Southern Europe have shown that Europe needs an appropriate response.

European citizens have very high expectations of the Union in the fight against terrorism and organised crime<sup>6</sup>. Without the Constitution, it will be more difficult to meet these aspirations. The main reasons for this lie with the intergovernmental framework, the decision-making process which governs cooperation in criminal matters, and 'demarcation' problems between the pillars. The limits of simple cooperation are soon apparent, especially when unanimity is required, and when cooperation is confined to intergovernmental instruments lacking the democratic and judicial legitimacy inherent in the Community method. The present framework often produces 'virtual' law, without direct effect and unable to be applied effectively and uniformly in the Member States. Wide-ranging political goals have to be pursued over the two pillars, leading to interminable discussions on where the dividing line falls.

The Constitution completely recasts the provisions on the area of freedom, security and justice, making it a Union policy like any other. Under the Constitution the policies on border controls, visas, asylum and immigration, as well judicial and police cooperation, are brought together under a single heading, and come within the scope of the Community method, and in particular the ordinary legislative procedure (co-decision) and qualified majority voting<sup>7</sup>. In all these fields, the Constitution provides for the use of the Union's normal legal instruments, with direct effect, and recognises the jurisdiction of the Court of Justice – a fundamental principle in an area which touches on human rights<sup>8</sup>.

So without the Constitution the Union is deprived of a proper European asylum regime and a real common immigration policy. In particular, it is missing out on the opportunity to establish police and judicial cooperation in criminal matters, a field in which the Constitution introduces important innovations, for example by clarifying the powers of the Union to harmonise criminal law, by allowing the adoption of laws with direct effect in key areas such as the definition of and penalties for serious cross-border crime – terrorism, drug-trafficking or organised crime - or the European arrest warrant, and by

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<sup>6</sup> Special Eurobarometer No 251 'The future of Europe' – May 2006.

<sup>7</sup> A small number of exceptions have nevertheless been retained.

<sup>8</sup> A single exception remains: the Court still has no jurisdiction to review the validity or proportionality of operations carried out by the police or to review the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order.

creating the possibility of conferring operational powers on Europol by qualified majority and co-decision. Finally, the prospect of establishing a European Public Prosecutor's Office with powers to investigate, prosecute and bring to judgment offenders and accomplices in crimes against Community financial interests, recedes still further.

- Economic policies

The explosion in oil prices, the sudden problems with the supply of gas, and Europe-wide interruptions in electricity supply have underlined the fragility of the European Union and the need for a common energy policy. The European level is widely recognised as being most appropriate for confronting such challenges as the security of supply, increasing consumption and climate change<sup>9</sup>.

The Commission has committed to adopt an ambitious energy strategy in 2007 with the aim of establishing a genuine European **energy** policy. Without the Constitution, however, which introduces a legal basis allowing the adoption of energy policy measures by co-decision procedure with the European Parliament, the options open to the Union for the development of a wide-ranging policy remain limited.

Another major challenge facing Europe is **research** and technological development. It is vital for the Union to take more effective action and provide itself with the resources to face up to international competition. But if there is no Constitution all the Union can do is to support research, mainly through its framework programme and the specific programmes, without a fully-fledged European research area. Without a legal basis allowing the development of a **European space policy**, notably in the form of a space programme, the Union has no choice but to make do with the instruments currently at its disposal, which limits future development in this field.

- Health and social policies

Although the Constitutional Treaty, the fruit of a delicate consensus between Member States, contains only limited alterations to social policy, some of the provisions it contains would enable the social dimension of Community actions and policies to be strengthened.

The Constitution not only carries through all the current provisions for employment policy, **social policy** and the free movement of workers: it also introduces new elements whose effects should not be underestimated. A new horizontal clause, for example, requires the Union to take into account the requirements of a high level of employment, proper social protection and combating social exclusion when it is defining and implementing policies. The Constitution would also oblige the Community legislature to abide by the social and economic rights and principles of the Charter of Fundamental Rights in all areas. With no Constitution, citizens will lose the guarantee that these requirements will be taken into account when such policies are drafted and implemented.

In recent years, Europe has experienced several epidemics that have presented a serious risk to human **health**. This is by definition a cross-border problem, which only a joint response can hope to address. With that in mind, the Constitution introduces a provision

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<sup>9</sup> Special Eurobarometer No 247 'Attitudes towards Energy' – January 2006.

permitting the Union to legislate whenever common safety and security issues are involved. This is not confined to health and phytosanitary measures but extends to the safety of medicinal products and the fight against cross-border threats such as epidemics, chemical accidents and bio-terrorism.

Devastating forest fires or massive floods are among the disasters that regularly face countries throughout Europe. The Commission provides support by coordinating the work of national civil protection agencies, but it has no stable basis for doing so. The Constitution provides the Union with an explicit power to support national actions and promote operational cooperation in **civil protection**. Without the solidarity clause, assistance to Member States afflicted by natural catastrophes would remain uncertain.

- Participative democracy

European citizens already have a wide range of instruments at their disposal enabling them to learn about and take part in the Community's political process. Commission-led initiatives to improve regulation are stepping up consultation and the justification of new proposals, strengthening the democratic legitimacy of the decision-making process. Nonetheless, the period of reflection has revealed that demand for participation in Community public debate is rising, and that citizens are increasingly keen to make their voices heard. The absence of a Constitution deprives the Union of a solution in the form of the **Citizens' initiative**, whereby the Commission could be petitioned for action if a million signatures were collected.

## 2. Foreign policy coherence

It is clear from an analysis of the debates that have taken place during the period of reflection that Europeans broadly welcome the Union's efforts to promote peace and democracy in the world. A large number of citizens have also made clear that Europe should have a strong presence on the world stage, make its voice heard and take joint initiatives in matters of foreign policy.

While some international political crises have highlighted the difficulty of defining a joint position, the Union's response to the crisis in Lebanon demonstrated that the potential exists for a joint foreign policy. The Commission has already set out the external challenges that Europe must meet and the difficulties that it faces in meeting such challenges, and it has recommended a number of measures in response.<sup>10</sup> Without a Constitution, however, the Union lacks the instruments it needs to guarantee the effectiveness and coherence of its external action.

- A comprehensive external policy

The Union's provisions for external action are currently scattered throughout the treaties. The Common Foreign and Security Policy is the subject of a Title in the Treaty on European Union, whereas trade policy and development cooperation are covered by the EC Treaty. The failure to agree on the Constitution meant that an opportunity to add clarity and coherence to these piecemeal provisions was missed. By grouping all the external policy provisions under a single Title, the Constitutional Treaty improves their legibility and brings consistency to Community action. All aspects of the principles and

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<sup>10</sup> Europe in the World, COM(2006) 278 final.

objectives which should guide the Union's actions on the international stage, including the external aspects of internal policy, can now be formulated clearly.

**European security and defence policy** (ESDP) is another missed opportunity. The prospect of a true common defence in the Union framework has now receded, and any possibility of strengthened cooperation in this area must now be excluded. The mutual defence clause, which introduces an obligation to assist any Member State that comes under attack, will not apply.

These are not the only advances in external action of which the Union has been deprived. The Constitution introduces a precise legal basis for **humanitarian aid**, for example, enabling the framework of Community action to be established and a European Voluntary Humanitarian Aid Corps to be set up using the ordinary legislative procedure. The main objective of European **development** cooperation policy is set as poverty reduction and eradication, which the Union must take into account when applying policies liable to have an impact on developing countries. Finally, all the Union's external actions are geared towards the **promotion of European values in the rest of the rest of the world**.

- New instruments for the Union's external actions

The Constitution provides for new instruments to bring coherence, effectiveness and visibility to external actions, instruments which partly require the prior revision of the treaties.

In the absence of a Constitution, there will be no post of **Minister for Foreign Affairs**. This would have been an influential institutional actor and a pillar of the Union's external action. Playing a dual role by largely bringing together the functions of High Representative for the CFSP and the Commissioner for External Relations, the Minister for Foreign Affairs was to contribute to the development of CFSP and the ESDP. The Constitution gave the Minister a right of initiative in such matters, and also included a responsibility for implementing these policies. The "double hatting" of Minister for Foreign Affairs and Vice-President of the Commission was intended to encourage closer cooperation between the Commission and the Council, harmonise external policies and bring consistency to Union action, using all the available instruments together. The Treaties do not at present allow the appointment of a Minister for Foreign Affairs, as they do not allow for a double allegiance to the Council and the Commission.

In the absence of such a minister there is little to be gained by creating the **European External Action Service**, which was intended to support the Minister's work. Bringing together officials from the General Secretariat of the Council, the Commission and the diplomatic services of Member States, the service would have allowed expertise to be pooled from the institutions and the Member States, increasing the efficiency of the Union's external action.

Finally, the Constitution also enshrines the Union's **legal personality**, which is currently exercised only by the European Community. This formalisation, in tandem with the removal of the pillars, would have clear consequences for the Union's external action, as it authorises the Union to conclude treaties governing matters within its powers, whereas Europe's current capacity to conclude international agreements is complex and uneven. In its relations with the rest of the world, the Union might thus have acted in a manner that was more effective, more consistent and more credible.

### 3. Democracy and Institutions

The Constitution strengthens certain policies where joint control is in the Union's interest. If it is to manage these policies effectively, ensure that the Union of 27 Member States has the capacity to act, and guarantee a strong European presence on the European scene, the Union must be based on institutions that are effective, democratic and transparent. The Constitutional Treaty meets that challenge by simplifying the decision-making process while maintaining the balance between the institutions. It also simplifies the classification of legal acts, making it easier to understand.

- The decision-making process

Every time the Treaties have been amended, from the Single Act to the Constitution, the core objective has been to increase the legitimacy and efficiency of the Community decision-making process. With each successive Treaty the powers of the European Parliament, as the expression of the will of the people, have been extended, and Parliament has become a fully-fledged participant in the Community legislative procedure. The Constitution confirms the trend.

By determining that the codecision procedure is the **ordinary legislative procedure** and extending it to a number of additional areas, the Constitution **reinforces the role of Parliament as legislator**. For example, the European Parliament is currently only consulted on legal immigration and proposals relating to judicial cooperation in criminal matters. The Constitution would give it real legislative power in these areas, on an equal footing with the Council. Likewise, while Parliament is currently only consulted on common agricultural policy (CAP) measures, the Constitution would allow Parliament a co-legislative role regarding the common market organisations and other measures in the interests of the CAP.

As for the budgetary powers shared by the European Parliament and the Council, the Constitution would make limited changes. But the reference in the Treaty to the multiannual financial framework is significant, as it confirms a standard practice while boosting the role of Parliament, whose approval would now be required. Apart from that, the Council currently has the last word on compulsory expenditure while Parliament has the last word on non-compulsory expenditure (NCE). The Constitution would abolish the distinction, and Parliament and the Council would determine all expenditure, including direct support for agriculture, by codecision.

The Constitution reinforces Parliament's powers in relation to international agreements: its consent would be required for all agreements covering matters governed by codecision. This simple rule substantially extends the position under the present Treaties, whereby Parliament's assent is required only where the agreement entails an amendment of an act adopted by codecision.

**National parliaments**, which would enjoy greater possibilities for involvement in the Community decision-making process under the Constitution, also stand to lose if the Constitution is not adopted. It is true that the Commission has already moved on to a new stage in its relations with the national parliaments, in the interests of greater openness and transparency. Since the beginning of September, the Commission has put in place an internal system to respond to national parliaments' comments on legislative proposals and consultation documents, which are now sent to them direct. But this system is still on an informal basis.

The Constitution goes further. The early-warning mechanism allows the national parliaments to issue a reasoned opinion to the European Parliament, the Council and the Commission on the conformity of a legislative proposal with the subsidiarity principle, and the Commission is then required to review its proposal if there are reasoned opinions from a third of the national parliaments. National parliaments would also have the possibility of bringing an action in the Court of Justice, via their own Member State, for violation of the subsidiarity principle by a legislative act. In the absence of the Constitution, national parliaments no longer have any guarantee that the Commission will review its proposal or the possibility of taking action in the Court of Justice to enforce the subsidiarity principle. In addition, the simplified revision procedure for switching to qualified majority and the ordinary legislative procedure entails compulsory prior information for the national parliaments. If a national parliament challenges the decision within six months, it cannot be adopted.

The Constitution supports the Union's democratic objectives by reinforcing the powers of the European Parliament and involving the national parliaments in the policy-making process. But the Union's legitimacy also flows from the Council, where the Member States are represented. The Constitution **redefines a qualified majority** to simplify and facilitate decision-making in the Council. It would replace the current system of weightings by the principle of a dual majority both of Member States and of population. This system would be simpler and more transparent, reinforcing the dual legitimacy of a Union of states and peoples. Moreover, it would make it easier to reach the qualified majority needed to adopt a proposal.

Not only is the qualified majority easier to reach, but it is also applied more widely. The unanimity rule in the Council is often a source of deadlock, as rejection by just one Member State entails rejection outright. As the number of Member States rises, the risk of such a deadlock becomes all the more acute. The Constitution limits the risk, by **extending qualified majority voting** in the Council, replacing unanimity in 24 situations. In the absence of the Constitution, decisions concerning immigration or culture, for example, will continue to require unanimity.

The Constitution also provides for a simplified revision procedure whereby the European Council, acting unanimously with the approval of the European Parliament, may authorise the changeover to the ordinary legislative procedure and QMV. This **passerelle clause**, extended to apply generally to all Union policies and operating matters, allows decision-making machinery to be modified without the need for an Intergovernmental Conference.

- The institutions

As noted above, the Constitution establishes the function of Minister of Foreign Affairs. But that is not the only innovation designed to raise the profile, consistency and effectiveness of Community action.

The European Council is currently chaired by the Head of State or Government of the country holding the rotating presidency from time to time and changes every six months. In the absence of the Constitution, this system would remain in place, rather than a stable presidency allowing the coherence, continuity and efficiency of European Council business to be improved. The **President of the European Council**, as provided for by the Constitution, could hold office for between two and a half and five years, which would reinforce the Union's top-level representation. Exercising this activity on a full-

time basis would enable the President to devote all his energy to seeking consensus and thus facilitating decision-making in the European Council.

The changes as regards the **Commission**, and in particular the question of its composition, follow the logic of this set of reforms to the three corners of the institutional triangle. The Constitution provides that from 2014, the Commission will consist of a number of members corresponding to two thirds of the number of Member States, i.e. 18 in a 27-member Union. The European Council will have to establish a rotation scheme treating the Member States on an equal footing to reflect both population and geography. In the absence of the Constitution, this question is on hold. It will already have to be addressed when the next Commission is appointed, on the basis of the Nice Treaty, which establishes the principle of a smaller Commission but does not determine the number of Commissioners, leaving a difficult question unresolved. Moreover, if the question of Commission membership is dealt with in isolation, there is a risk that the institutional balance achieved in the context of a more comprehensive agreement will be jeopardised.

As regards the **Court of Justice**, the Constitution would at last fill in the gaps in judicial protection under the existing Treaties regarding JHA matters; sanctions under the CFSP; or the currently very restrictive conditions for direct actions by individuals challenging Community instruments, which have been criticised for some time now and are difficult to reconcile with the principle of the rule of law. The Constitution would also set up a genuine three-tier judicial system in the Union (specialised courts, General Court, Court of Justice) and provide for qualified majority voting and codecision for acts developing it. As long as the reform of the Court of Justice remains subject to unanimity as in the current Treaties, it will be extremely difficult to reach agreement among 27 Member States on the establishment of an adequate judicial system meeting the needs of the more elaborate policies in an enlarged Union.

- The legal framework

The Union and/or the Member States: who does what in the European Union? That is a question that the general public finds difficult to answer – leading to much misunderstanding. The Union has the powers conferred on it by the Treaties and exercises them to attain the objectives set for it in specific policy areas. But the current system does not provide for homogeneous categories of powers. The Union accordingly suffers from a lack of clarity, which has prompted disputes between the institutions and the Member States, each side being anxious to preserve its own powers.

The Constitution introduces a **general classification of powers**, which would enhance both the clarity and the efficiency of the Union's legal system, as well as the trust of the Member States and the general public in the system. This classification is a valuable source of clarification. And the effect is to clearly delimit the powers of the Member States in areas of exclusive power and the powers of the Union in areas for supporting, coordinating or complementary action, thus automatically limiting the possibility of conflicts.

The European Union operates on the basis of the Rome Treaties whose 50<sup>th</sup> anniversary is about to be celebrated, as last amended by the Nice Treaty. Since the 1950s, a large number of additional instruments have gradually been grafted on to the basic rules, amending or amplifying the founding treaties. The result is a complex and voluminous

structure repealing and replacing the existing Treaties with a single instrument,<sup>11</sup> the Constitution establishes a clear, simple, user-friendly legal framework.

## **Conclusion**

This paper has shown that, even without the Constitution, the Union has taken significant steps forward. But it is equally clear that with the Constitution in force, the Union would have more effective tools to address the challenge of globalisation and to work with more democracy and more accountability, both internally and in external relations. It would also be better place to maximise the benefits of the enlarged Europe.

As set out in the Commission Legislative and Work Programme for 2007, next year will be central to the search for an institutional settlement. The European Council in June set out a clear process and a timetable, and the next Presidency is tasked with presenting a report to assess the state of discussions on the Constitutional Treaty and to consider new developments. The Commission will participate actively in this process and will work closely with the other institutions to acheie the goal of a comprehensive institutional settlement.

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<sup>11</sup> Except for the Euratom Treaty.